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No. 520

In the Supreme Court of the United States

OCTOBER TERM, 1942

D. T. B. BRINGER AND COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	4
Summary of argument	11
Argument:	
I. The findings of the Commission support its conclusions that the proposed tariffs violate neither Section 2 nor Section 3 (1)	15
A. The Commission's report contains sufficient findings	15
B. It is apparent that Section 2 does not apply as a matter of law	24
C. The Commission's findings support its conclusion that there was no violation of Section 3 (1)	26
II. The Commission, though considering a separately stated accessorial charge, was entitled to look to the respective line-haul conditions	28
III. There is substantial evidence to support the Commission's findings	34
Conclusion	37
Appendix	38

CITATIONS

Cases:

Alton & S. R. R. v. United States, 49 F. (2d) 414	31
Atchison, Topeka & Santa Fe Railway Company v. United States, 232 U. S. 199	31
Atchison, Topeka & Santa Fe Railway Company v. United States, 295 U. S. 193	18, 22
Board of Trade of Kansas City v. United States, 314 U. S. 534	27, 28
Bunker Hill & Sullivan M. & C. Co. v. N. P. Ry Co., 129 I. C. C. 242	25
Cane Sugar from Wisconsin to Minnesota, 203 I. C. C. 371	25

313186—43——1

Cases—Continued

	Page
Central R. R. Co. of New Jersey v. *United States*, 257 U. S. 247	32, 33
General Utilities Co. v. *Helvering* 296 U. S. 200	23
Helvering v. *Gowran*, 302 U. S. 238	26
Hornel v. *Helvering*, 312 U. S. 552	26
Interstate Commerce Commission v. *Alabama Midland Ry.*, 168 U. S. 144	26, 27
Interstate Commerce Commission v. *Del. L. & W. R. R.*, 220 U. S. 235	28
Interstate Commerce Commission v. *Stickney*, 215 U. S. 98	30
Isbrandtsen-Moller Co. v. *United States*, 300 U. S. 139	26
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457	18, 22, 27, 28
Meeker & Company v. *Lehigh Valley R. R.*, 236 U. S. 412	18
Miller Waste Mills, Inc. v. *Chicago, M., St. P. & P. R. Co.*, 226 I. C. C. 451	25
National Labor Relations Board v. *Ford Motor Co.*, 114 F. (2d) 905, certiorari denied, 312 U. S. 689	23
National Labor Relations Board v. *National Motor Bearing Co.*, 105 F. (2d) 652	23
New England Divisions Case, 261 U. S. 184	34
Pacific Lumber Co. v. *N. W. P. R. R. Co.*, 51 I. C. C. 738	25
Pacific States Butter, Egg, Etc., Assoc. v. *Southern Pacific Co.*, 151 I. C. C. 244	31
Perishable Freight Investigation, 56 I. C. C. 449	31
Quanah, A. & P. Ry. Co. v. *United States*, 28 F. Supp. 916, affirmed, *per curiam*, 308 U. S. 527	18, 22
Richmond Chamber of Commerce v. *Seaboard Air Line Railway*, 44 I. C. C. 455	25, 29
Riley Co. v. *Commissioner*, 311 U. S. 55	26
Rochester Telephone Corp. v. *United States*, 307 U. S. 125	27, 33
Seaboard Air Line Ry. Co. v. *United States*, 254 U. S. 57	26, 30
Southwestern Cotton, 208 I. C. C. 677	5
Standard Oil Co. v. *Director General*, 87 I. C. C. 214	25
Texas and Pacific Ry. v. *Interstate Commerce Commission*, 162 U. S. 197	27
Tide Water Oil Co. v. *Director General*, 62 I. C. C. 226	25, 30
United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454	18
United States v. *Carolina Freight Carriers Corp.*, 315 U. S. 475	34
United States v. *Chicago Heights Trucking Co.*, 310 U. S. 344	27, 28
United States v. *Chicago, Milwaukee, St. P. and P. Ry. Co.*, 294 U. S. 499	23
United States v. *Louisiana*, 290 U. S. 70	18, 22, 23
United States Box & Basket Co. v. *White*, 296 U. S. 176	18, 22
Western Chemical Co. v. *United States*, 271 U. S. 268	31
Wight v. *United States*, 167 U. S. 512	24, 26

Statute:

Interstate Commerce Act, c. 104, Part I, 24 Stat. 379, as amended (49 U. S. C. 1–27): Page

Sec. 1 (1) (a) 38
Sec. 1 (3) (a) 28, 38
Sec. 1 (5) (a) 20, 30, 39
Sec. 2 ..... 3, 12, 13, 28, 40
Sec. 3 (1) 4, 12, 13, 40
Sec. 6 (1) 41
Sec. 15 (1) 42
Sec. 15 (7) 43

Miscellaneous:

H. Rep. No. 591, 59th Cong., 1st sess., p. 4 18

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OPINIONS BELOW

The *per curiam* opinion of the specially constituted district court, together with its findings of fact, conclusions of law, and final decree (R. 78–85), is not officially reported. The report of the Interstate Commerce Commission (R. 13–34) appears in 248 I. C. C. 643.

JURISDICTION

The final decree of the district court was entered on August 17, 1942 (R. 85). Petition for appeal was both presented and allowed on October

7, 1942 (R. 87–88, 93). Jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–221 (28 U. S. C. 47, 47a) and under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (28 U. S. C. 345). Probable jurisdiction was noted by this Court on December 7, 1942 (R. 294).

QUESTIONS PRESENTED

The ultimate question is as to the validity of an order of the Interstate Commerce Commission issued in an investigation and suspension proceeding which sustained as not unlawful (*i. e.* not in violation of either Sections 2 or 3 (1) of the Interstate Commerce Act) a proposed change in the tariff charges for the loading of cotton at stations in Oklahoma served by the railroad appellees.[1] The proposed change eliminated an existing charge for loading cotton by the railroad appellees at the first origin, provided such cotton was subsequently reshipped under transit on carload rates to various Texas-Gulf ports[2] or Lake

[1] Atchison, Topeka and Santa Fe Railway; Gulf, Colorado and Santa Fe Railway; Panhandle and Santa Fe Railway; Missouri-Kansas-Texas Railroad Company, and Kansas City Southern Railway. The change was also proposed by the Oklahoma Railway Company which did not intervene in this case. (See R. 109.)

[2] The term Texas-Gulf ports, as used herein, refers to the following Texas cities on the Gulf of Mexico: Beaumont, Corpus Christi, Galveston, Orange, Port Arthur, and Texas City.

Charles, Louisiana. The existing charge was continued, however, on the same cotton loaded at the same stations if subsequently reshipped under transit on carload rates to the Southeast. Subordinate questions are:

1. Whether the findings of the Commission support its conclusions that the proposed tariffs violate neither Section 2 nor Section 3 (1) of the Interstate Commerce Act.

2. Whether the Commission, though considering a separately stated accessorial charge, was entitled to look to the respective line-haul conditions.

3. Whether there is substantial evidence to support the Commission's findings.

STATUTES INVOLVED

The pertinent provisions of Part I of the Interstate Commerce Act (49 U. S. C. 1–27) are reproduced in the Appendix, *infra*, pp. 38–44. For convenience, Sections 2 and 3 (1) of the Act, which are the primary provisions here involved, are set forth in full at this point:

> SEC. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives

from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful (49 U. S. C. 2).

SEC. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description (49 U. S. C. 3 (1)).

STATEMENT

The instant case presents the latest chapter in the history of the efforts of the railroads in recent years to meet the competition of motor trucks in securing cotton traffic. The history of this strug-

gle is well described in the present report of the Commission and in the report of the Commission in the so-called *Southwestern Cotton* case (*Cotton From and to Points in Southwest and Memphis*), 208 I. C. C. 677. The latter report is frequently referred to in the present report and affords the immediate setting for the present case.

For many years the carriers maintained only less than carload or any-quantity rates on cotton originating in the Southwest (R. 15). Under the any-quantity rates, as the term implies, the rate between two points is the same whether the quantity shipped is a single bale or a full carload. Under these rates the carriers performed all necessary loading services without additional charge, as is customary with less than carload freight. (R. 15.)

However, in order to meet truck competition, the railroads serving the Southwest (Texas, Arkansas, Oklahoma, Kansas, Missouri, and Louisiana) at various times in 1932 and 1933 established in addition a scheme of greatly reduced carload rates on cotton to various points, including the Texas-Gulf ports, Lake Charles, Louisiana, and southeastern mill points (R. 15, 18; *Southwestern Cotton* case, 208 I. C. C. 677, 680, 683). With some exceptions, these rates were generally approved by the Commission in the *Southwestern Cotton* case. This scheme of rates provides for the gathering of cotton in small quantities at cotton "gin origins" (country stations) into nearby

compress or transit points. From such points it is reshipped to ultimate destination in carload lots, subject usually to carload weight minima of 50,000 or 65,000 pounds. (R. 15, 22.) The purpose of the stop in transit at the compress point is to permit compression and consolidation so that the most favorable rate from a weight basis may be secured (R. 20). In most cases, including that of appellant, at the time of the initial shipment from the origin to the compress point, the railroads assess the full local or transit rate, sometimes known as a float-in rate (R. 15, 21). Later, when carload reshipment is made, the railroads collect the full local carload rate from the compress point to the final destination (R. 21). Under a so-called "transit" privilege, the shipper files a claim with the carrier and the aggregate inbound and outbound charges paid are readjusted; a refund is made so that the shipper is ultimately charged only the through carload rate from gin origin to final destination via the transit station (R. 15, 21).

Since these carload rates were substantially lower than the any-quantity rates, the carriers, at the time of the establishment of the carload rates and in connection therewith, imposed on the shipper the obligation of loading the cotton at the gin origins (R. 15–16). If the carriers loaded the cotton at the gin origins at the shippers' request, they imposed a charge therefor of 5.5 cents per square bale and 2.75 cents per round bale (R. 16). The rate governing the loading of cotton is car-

ried both in the tariff which publishes the through carload rates and in the tariff which provides the float-in rates and the transit privilege (R. 135). These loading charges are now generally collected at the time the transit claim is settled by deducting the charge from the transit settlement (R. 79, 184).

The Truck competition continued to increase, despite these reduced carload rates, particularly between Texas origins and the Texas-Gulf ports (R. 17). Effective October 15, 1939, the railroads serving Texas adopted a free loading policy under their carload rates (R. 17, 20). They published tariffs applicable on cotton traffic originating within the state of Texas which provided that the rail carriers would load cotton tendered to carriers at their depots or cotton platforms at Texas origins and would bear the expense of such loading (R. 17). Division 2 of the Commission refused, after protest against these tariffs, to suspend them, and the Railroad Commission of Texas granted authority to eliminate the loading charge on cotton, intrastate, effective October 28, 1939 (R. 17).

The carriers operating between Oklahoma and the various Texas-Gulf ports were also faced with truck competition (R. 17, 22). Reductions in through rates for the purpose of more adequately meeting truck competition were made applicable from the Southwest, including Oklahoma, on June 20, 1940, but the charge for loading in car-

load lots still annoyed the Oklahoma shippers who continued to increase their deliveries to trucks throughout 1940 (R. 22). To meet this competition, the railroads operating between Oklahoma and the Texas-Gulf ports (Atchison, Topeka, and Santa Fe; Gulf, Colorado, and Santa Fe; Panhandle and Santa Fe; Missouri-Kansas-Texas; and the Kansas City Southern, appellees here, and the Oklahoma Railway) filed with the commission tariffs to become effective June 11, 1941, proposing to cancel the aforementioned loading charge on shipments of cotton, in carloads, from Oklahoma to the Texas-Gulf ports and Lake Charles, Louisiana (R. 14, 17). The proposed change was to be accomplished by inserting the following exception in both the transit and the rate tariffs, which are set forth in Exhibit 27[*] of the record before the Commission and reproduced in appellant's brief (pp. 57–59):

> Applicable only at points in Oklahoma on the AT&SF, GC&SF, P&SF, or M-K-T or KCS or Okla Ry and only on shipments to Beaumont, Corpus Christi, Galveston, Houston, Orange, Port Arthur or Texas City, Texas or Lake Charles, La. When cotton is tendered to carrier at origin on its

[*] By stipulation (R. 293–294) it was agreed that the exhibits before the Commission, while certified as part of the record to this Court (R. 100), should not be printed, but might be referred to on brief or argument by either party as if printed.

depot or cotton platform, such shipment will be loaded by or at the expense of the carrier.

As is evident from this language, the free loading rule was applicable only to these points and did not cover shipments to the Southeast (R. 18). It is to be noted that none of these carriers serves the Southeast and that they do not have any but a very short part of the line-haul on cotton from Oklahoma to the Southeast, as is shown by the map appended at the end of appellant's brief.

Appellant, as appears from an affidavit executed by its president and introduced before the district court (R. 279–284), purchases cotton at Oklahoma gin and compress points located on the lines of appellee railroads and resells the cotton purchased by it to domestic mills located in the Southeast (Georgia, Alabama, South Carolina, and North Carolina). It pays or has paid for its account this loading charge, and it competes in purchasing in Oklahoma with cotton merchants who ship to the Texas-Gulf ports and who under this changed tariff policy are relieved from this loading charge (*ibid.*). In view of this situation, appellant on May 28, 1941, filed a petition with the Commission, under Section 15 (7) of the Interstate Commerce Act, to suspend these tariffs on the grounds that they were discriminatory and prejudicial to it and preferential to the Gulf port merchants, in violation of Sections 2 and 3 (1) of the Interstate Commerce Act (R. 4, 103–105).

Because of this and other protests, the Commission entered an order on June 11, 1941, (R. 11–12) suspending the effective date of the proposed change until January 11, 1942, and instituted investigation and suspension proceedings to ascertain the lawfulness thereof (R. 14). Subsequently, the carriers further deferred the effective date of the change until the proceedings should be concluded (R. 15). On January 29, 1942, the Commission, Division 3, after hearing, issued a report[1] and order finding the proposed change not to be unlawful and vacating the order of suspension (R. 13–34). A petition for reconsideration by appellant was denied by the full Commission on April 13, 1942, and this tariff change became effective on April 21, 1942 (R. 6). Since appellant disputes just what the pertinent findings of the Commission were, they will be considered in the argument rather than here.

On May 11, 1942, appellant brought suit against the United States and the Commission in the District Court of the United States for the Western District of Tennessee to set aside the order (R. 80). The carriers involved, except the Oklahoma Railway, sought permission to intervene as defendants

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[1] This report was known as *Investigation and Suspension Docket No. 4981, Loading Cotton in Oklahoma.* It also embraced *Investigation and Suspension Docket No. 4996, Loading Cotton on St. L. S. F. and T. Railway in Texas,* which involved a proposal by the respondent therein to reestablish a loading charge in Texas. (R. 13.) This latter case is not now before this court.

and were permitted to do so by an order of June 29, 1942 (R. 60–65, 80–81). Final hearing was held before a specially constituted three-judge court on July 8, 1942 (R. 81). A certified copy of the oral testimony and documentary exhibits introduced in the proceedings before the Commission, and certain other documents considered by the Commission were received in evidence by the court (R. 81) which also received an affidavit filed by appellant solely for the purpose of showing appellant's standing to sue (R. 81). On July 17, 1942, the district court filed a *per curiam* opinion, findings of fact and conclusions of law (R. 78–85), and on August 17, 1942, a final decree dismissing the complaint was entered (R. 85).

SUMMARY OF ARGUMENT

I

The various recitals in the Commission's report afford ample basis for the district court's holding that the Commission found, *inter alia*, that there is (1) no trucking of cotton between points in Oklahoma and the Southeast whereas there is trucking of cotton between points in Oklahoma and the Gulf ports, (2) that the carload rates on cotton from Oklahoma origins to the Southeast are on a relatively lower basis than the carload rates from the same origins to the Gulf ports, and (3) that the rates from points in Oklahoma both to the Southeast and to the Gulf ports are depressed. These findings are obviously predi-

cated upon a finding, not specifically stated, that under the circumstances here, the Commission, in considering whether discrimination under Section 2 or prejudice under Section 3 (1) of the Interstate Commerce Act resulted from the practice with respect to the loading charges, was entitled to look to the respective line-haul conditions. Since it is the substance rather than the form of findings which controls, the Commission's report must be considered as containing this latter finding. We therefore submit that this Court is entitled to look at the line-haul conditions, and we ask the Court to take judicial notice of the fact that the respective line-hauls from Oklahoma to the Texas-Gulf ports and to the Southeast are to different destinations, for different distances, and in part over different railroads. In view of these circumstances, Section 2, as a matter of law under numerous decisions of this Court and the Commission, has no application to this situation. Admittedly, it does not expressly appear from the report that the Commission applied this rule of law in considering the Section 2 issue. If the Commission reached its decision under Section 2 on the theory that there was a difference in truck competition or a difference in the relative level of the line-haul rates, it was considering factors which it was not authorized to consider in a Section 2 case. But since the Commission, as a matter of law, reached the right result, its decision must still be sustained under the settled rule. On

the other hand, on the issue of prejudice under Section 3 (1) of the Act, it has been held by this Court that the Commission is entitled to consider such elements as difference in competition and difference in the level of line-haul rates. Accordingly, the aforementioned findings afford ample support for the Commission's conclusion that the proposed change in the practice with respect to loading charges would not contravene Section 3 (1).

II

There is no statutory provision which requires the Commission, when considering whether a carrier's practice in levying or not a separately stated accessorial charge is discriminatory or prejudicial, to compare only the respective physical services performed under the accessorial charge. The decisions both of the Commission and of the courts, under Sections 2 and 3 (1), as well as under Section 1 (5) (a), establish rather that under such circumstances the Commission in an appropriate case is free to consider and compare the conditions surrounding the respective line-hauls. Whether in a particular case the line-haul conditions are to be considered is only one of the numerous factual determinations which the Commission is required to make in reaching its ultimate expert factual conclusion as to whether a discrimination or prejudice is "unjust" or "undue." If there is any rational basis therefor,

the Commission's exercise of discretion in this instance cannot be judicially disturbed. In the present case there is a rational basis for looking to the line-haul conditions, principally because under the particular tariffs the incidence of the loading charge is made to depend solely upon what particular place is the ultimate line-haul destination.

III

There is substantial evidence to support the Commission's findings both that there was a difference in truck competition on the respective line-hauls, and that the level of the rates to the Southeast was already lower. Appellant admits that the evidence shows a difference in the truck competition on the respective line-hauls from the compress points to the Gulf ports or to the Southeast, but it contends that the evidence shows no differences in truck competition between the points of origin and the nearby compress points. That, however, is immaterial, because the Commission based its decision on the theory that it was entitled to look to the line-haul conditions, and the findings relate to such conditions. The evidence by appellant's own admission was ample to support the finding that there was a difference in the truck competition met on the respective line-hauls. The abundant evidence as to difference in ton-mile and car-mile gross returns under the respective carload rates to the Gulf ports and to the Southeast

affords ample support for the Commission's conclusion that the rates to the Southeast were already on a relatively lower basis.

ARGUMENT

I

THE FINDINGS OF THE COMMISSION SUPPORT ITS CONCLUSIONS THAT THE PROPOSED TARIFFS VIOLATE NEITHER SECTION 2 NOR SECTION 3 (1)

A. THE COMMISSION'S REPORT CONTAINS SUFFICIENT FINDINGS

The Commission's ultimate conclusion was as follows:

> We, therefore, find that the elimination of the rail carriers' loading charge on cotton originating in Oklahoma on respondents' lines, compressed in transit and moving from compress point to Texas-Gulf ports and Lake Charles, La., at the carload rate from origin point, is just and reasonable and not shown to be otherwise unlawful (R. 31–32).

Appellant does not quarrel with this ultimate finding, admitting (Br. 26) that it is the equivalent of a finding that "the proposed change is not shown to be in violation of or prohibited by Section

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The Commission stated in its report that "it has not been shown that any provisions of the Interstate Commerce Act would be violated if the suspended Oklahoma rule is permitted to become effective" (R. 30). Appellant had contended that the proposed tariffs would violate Sections 2 and 3 (1) (R. 4, 5, 8, 35).

2 or Section 3 (1)". Its objection rather is to an alleged lack of preliminary findings.

As has previously been pointed out (p. 11, *supra*), the district court held (R. 83) that the Commission had made, *inter alia*, preliminary findings that there was (1) no trucking of cotton between points in Oklahoma and the Southeast whereas there was trucking of cotton between points in Oklahoma and the Gulf ports, (2) that the carload rates on cotton from Oklahoma origins to the Southeast were on a relatively lower basis than the carload rates on cotton from the same origin to the Gulf ports, and (3) that the rates from points in Oklahoma both to the Southeast and to the Gulf ports were depressed.

We submit that the following excerpts from the Commission's report clearly establish that the Commission did make the above three subordinate findings:

> The trucking of cotton to Texas-Gulf ports became acute in 1938–1939, particularly from Texas origins, as well as from country stations or gins to the compress points, usually some 50 miles distant. * * *
>
> * * * * * *
>
> * * * Reductions in through rates for the purpose of more adequately meeting truck competition were made applicable from the Southwest, including Oklahoma, on June 20, 1940, but the charge for loading in carload lots still annoyed the Oklahoma

shippers who continued to increase their deliveries to trucks throughout 1940 * * *.

* * * * * * *

The reason for not providing for the absorption of the loading charge in Oklahoma on traffic destined to the Southeast is that the rates to the Southeast are already lower relatively than they are to the Texas ports. Besides, there is no trucking of cotton from Oklahoma to Memphis or to the Southeast. * * *

The competition with trucks in Texas was found to be greater to the Gulf ports than from Oklahoma points to the Gulf ports, but the competition with trucks at the country stations to the compress points is shown to be proportionately keen in both states. Regardless, however, of the fact that the rates to the Southeast are relatively lower than to the Texas-Gulf ports, respondents stand ready to make the same free loading rule applicable from Oklahoma to such southeastern destinations.

* * * * * * *

The pertinent facts are these: The carload rates on cotton from Oklahoma to the Gulf ports and the Southeast are conceded by all parties to be below a reasonable maximum level, yet at the same time compensatory. This is affirmed in the *Southwestern Cotton case*. Some carriers feel that they must do something to retain the cotton traffic on their lines. They are using the free loading rule to assist them in retaining such traffic and at the same time attempting to

derive as much revenue as they can from the admittedly low level of rates now in effect on this traffic (R. 22, 23, 24, 30).

Appellant apparently urges that the Commission's report, despite this language, does not make satisfactory findings and does not make the aforementioned findings which the district court concluded it had, among others, made. This is completely to overlook the well settled rule that the Commission in connection with orders of this kind is not required to make formal and precise findings in the language which a court might use in making special findings of fact. *Meeker & Company* v. *Lehigh Valley R. R.*, 236 U. S. 412, 428; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 487; *United States* v. *Louisiana*, 290 U. S. 70, 80; *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 465; see H. Rep. No. 591, 59th Cong., 1st sess., p. 4. It is also to overlook the principle that it is substance rather than form which is controlling with respect to the Commission's findings. *Manufacturers Ry. Co.* v. *United States*, *supra*; *United States* v. *Louisiana*, *supra*; *Quanah, A. & P. Ry. Co.* v. *United States*, 28 F. Supp. 915, 918 (N. D. Tex., statutory three-judge court), affirmed, *per curiam*, 308 U. S. 527; cf. *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186; see Mr. Justice Stone's dissenting opinion, in which Mr. Justice Brandeis and Mr. Justice Cardozo joined, in *Atchison, Topeka & Santa Fe Railway Company* v. *United States*, 295 U. S. 193, 202.

These portions of the report, read together and in their entirety, plainly reveal that the Commission was not, as appellant charges, merely stating the contentions of the carriers, but was actually making the findings indicated.

Even assuming, as appellant further contends (Br. 30), that a finding cannot be considered as supporting an ultimate conclusion unless the report discloses the relation between the two, here the link is welded by the following finding[8] in the Commission's report, which is the rationale of the decision (R. 31):

> In the *Southwestern Cotton case* the Commission at page 724 said:
>
> "The practices which may have prevailed in the past with respect to free transit are no criteria in the present circumstances. In the past there was substantially no unregulated competition and the rates were not depressed. If the carriers gave a free service in one instance it was not unreasonable to expect them to give it in another. Now the situation has changed. In the present circumstances it is not only the carriers' right but their duty to conduct their operations in the most economical manner possible, in order to retain the greatest net revenue out of the low competitive rates which they are compelled to charge. The fact that they have provided certain transit services without charge in

[8] The district court concluded that this statement was a finding by the Commission (R. 83).

addition to the transportation rates, in instances where that seems to be good business policy from a competitive standpoint affords no basis for requiring them to assume the additional burden and expense incident to such services where the opportunities for corresponding benefits to them are lacking."

This was said with reference to the circumstances which distinguish the granting of transit in the interior but not at the ports. It applies with equal force to either[1] of the situations presented in the proceedings now before us.

It is also asserted by appellant (Br. 29) that the phrase "relatively lower" (see p. 16 *supra*) as applied to the line-haul rates to the Southeast conveys no meaning. It is said that the appropriate finding under these circumstances should have been "that cotton to the Southeast does not pay as much for line-haul service as it ought to pay in relation to the Texas ports." The phrase suggested might have been appropriate in a case where the Commission was considering the reasonableness *inter se* of the line-haul rates to the Texas Gulf ports and the Southeast under Section 1 (5) (a). Here, however, the Commission was concerned instead with the issue of discrimination and prejudice,

[1] By the phrase "either of the situations", the Commission meant the present situation and the converse situation presented in the companion docket, I. and S. 4996, wherein another railroad was seeking to reestablish the loading charge in Texas (R. 30).

In this connection, as the paragraph quoted immediately above indicates, the Commission thought the carriers should be furnishing additional free service under the already low line-haul rates only in cases where the greatest competitive advantage would be derived. Under this theory, whether the charges to the Southeast were already relatively lower, so far as the shipper was concerned, was of course pertinent because the carriers' failure to woo the southeastern shipper by free service would then be more justified, especially since there was no truck competition to that area. Read in its context then, the phrase, "relatively lower" can be given a clear and pertinent meaning, *viz,* that the gross rates to the Southeast were relatively lower to the shipper. As we shall show (pp. 35–36, *infra*), there is substantial evidence in the record to support the finding as so construed. While it is true that there is no finding that the Southeastern rates were necessarily relatively lower, so far as the net return which they brought to the carrier was concerned, that is immaterial in the present situation.

The above findings by the Commission with respect to the circumstances and conditions surrounding the respective line-hauls to the Southeast and to the Gulf ports, and the clear reliance upon such findings necessarily presuppose a finding of fact by the Commission that it was entitled under the circumstances of this case to consider the line-haul conditions even though it was specif-

ically dealing with a separately stated accessorial charge. It is true that the Commission's report does not contain such a preliminary finding in so many words. But the aforementioned findings are the complete and obvious equivalent of such a finding and they could not possibly have been made if the Commission had not in fact reached that conclusion. Under the rule that it is the substance rather than the form of findings which is controlling (*Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 487; *United States* v. *Louisiana*, 290 U. S. 70, 80; *Quanah, A. & P. Ry. Co.* v. *United States*, 28 F. Supp. 916, 918 (N. D. Tex., statutory three-judge court), affirmed, *per curiam*, 308 U. S. 527; cf. *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186; see Mr. Justice Stone's dissenting opinion, in which Mr. Justice Brandeis and Mr. Justice Cardozo joined, in *Atchison, Topeka & Santa Fe Railway Company* v. *United States*, 295 U. S. 193, 202), such a preliminary finding must be considered as having been made by the Commission. Furthermore, it would be

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In this connection see the following conclusion of law of the court below:

> In determining whether or not the provisions of Sections 2 and 3 of the Interstate Commerce Act have been violated by the publication of the tariffs under consideration here, the Commission properly considered the dissimilarity in circumstances and conditions between the line-haul movement of cotton from Oklahoma origins to the southeast and the line-haul movement of cotton from Oklahoma points to the Gulf ports here involved (R. 81).

an idle gesture to remand the case to the Commission for a specific preliminary finding on this question because the Commission could not possibly, consistently with these other findings, enter a finding other than this, or one that would in any way assist appellant. This Court has held that it will not require such a futile remand. *General Utilities Co.* v. *Helvering*, 296 U. S. 200, 207; see *Manufacturers Ry. Co.* v. *United States*, *supra*; *United States* v. *Louisiana*, *supra*. See also *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905, 912 (C. C. A. 6), certiorari denied, 312 U. S. 689; *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d), 652, 659 (C. C. A. 9).

We are well aware that the supplying of findings by implication in a report of the Commission is not to be countenanced under the rule of numerous cases. But here, because of the aforementioned findings, there is room for but one implication, and it is submitted that those cases are therefore inapplicable. Unlike the situation in those cases, to use the language of Mr. Justice Cardozo in *United States* v. *Chicago, Milwaukee, St. P. and P. Ry Co.*, 294 U. S. 499, 510, this is a situation where a "halting impression ripens into reasonable certitude." It is to be remembered also that one of the prime purposes of express findings in an administrative decision is that those affected will not be misled. But here appellant clearly un-

derstands that the Commission in effect made a finding of fact that it was under the circumstances entitled to consider the line-haul conditions. Its whole case is based on the alleged illegality of such action.

B. IT IS APPARENT THAT SECTION 2 DOES NOT APPLY AS A MATTER OF LAW.

Since the Commission in effect made the preliminary finding that it was proper under the circumstances to consider the conditions surrounding the respective line-hauls, we ask the Court to take judicial notice of the fact that the line-hauls to the Southeast and to the Gulf ports are to different destinations, for different distances, and in part over different railroads. This is of course evident from an examination of the map appended at the end of appellant's brief.

With this in mind, it is immediately apparent that Section 2 as a matter of law has no application to the present situation. It has been settled since an early time that this Section applies only where two shippers ship "over the same line, the same distance, under the same circumstance of carriage." It was so held in 1897 in *Wight* v. *United States*, 167 U. S. 512, 517–518, where this Court said:

> The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to en-

> force higher charges against one than another. * * * It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

This was not a case where the service involved was the actual carriage over the railroad, but was like the present case where free accessorial service (there drayage) was rendered to one shipper but not to another. See also *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 166.

The Commission has consistently held in accord with the *Wight* decision, that Section 2 does not apply where the line-hauls are not over the same line, for the same distance and to the same destination. *Richmond Chamber of Commerce* v. *Seaboard Air Line Railway*, 44 I. C. C. 455, 464–466; *Pacific Lumber Co.* v. *N. W. P. R. R. Co.*, 51 I. C. C. 738, 760; *Tide Water Oil Co.* v. *Director General*, 62 I. C. C. 226, 227; *Standard Oil Co.* v. *Director General*, 87 I. C. C. 214; *Bunker Hill & Sullivan M. & C. Co.* v. *N. P. Ry. Co.*, 129 I. C. C. 242, 246; *Cane Sugar from Wisconsin to Minnesota*, 203 I. C. C. 371, 376; *Miller Waste Mills, Inc.* v. *Chicago, M., St. P. & P. R. Co.*, 226 I. C. C. 451, 453. The first two of these cases also involved the validity of carrier practices whereby a separate

accessorial charge was absorbed in the line-haul rate for one shipper but not for another.

It is true that the Commission in its report does not specifically purport to base its conclusion under Section 2 on the foregoing rule of law. And if the Commission based its conclusion under Section 2 on the fact that there was a difference in motortruck competition and in the level of rates on the respective line-hauls, it was considering factors which it was not legally entitled to consider. *Wight* v. *United States*, 167 U. S. 512, 518; *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 166; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62. This, however, is immaterial, as long as the Commission reached the right result on any theory of law, which it manifestly did here. For the rule is now clearly established that if the decision of an administrative body, like that of a lower court, is correct on any legal ground, it must be affirmed on appeal even though the decision was actually based upon a different ground. *Helvering* v. *Gowran*, 302 U. S. 238, 245; *Riley Co.* v. *Commissioner*, 311 U. S. 55, 59; *Hormel* v. *Helvering*, 312 U. S. 552; see also *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 145.

C. THE COMMISSION'S FINDINGS SUPPORT ITS CONCLUSION THAT THERE WAS NO VIOLATION OF SECTION 3 (1)

Section 3 (1), the undue preference clause, is much broader than Section 2, the unjust discrim-

ination clause. It is well settled that, unlike the case under Section 2, the element of competition and all other factors which have a legitimate bearing on the situation may be considered[9] by the Commission in ascertaining whether a prejudice is "undue." *Texas and Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 218–220; *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 166. What is an undue preference, as well as what is an unjust discrimination, is a question of fact confided to the judgment and discretion of the Commission. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352–353; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546. The Commission's determination on such a question is not to be disturbed if there is any rational basis therefor. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146. Clearly the Commission's findings as to the differences in truck competition and in the relative level of rates on the respective line-hauls (R. 22, 23, 24, 30) were legitimate considerations and afford a rational basis for the conclusion reached under Section 3 (1) that there was no undue

[9] Appellant admits this (Br. 46), but confines its argument on Section 3 (1) to the proposition that as a matter of law the Commission was required to consider only the immediate circumstances surrounding the loading service and not those surrounding the respective line-hauls. This proposition is believed to be incorrect (see pp. 28–34, *infra*).

preference—assuming that the Commission was entitled to consider the line-haul conditions at all (see pp. 28–34, *infra*).

II

THE COMMISSION, THOUGH CONSIDERING A SEPARATELY STATED ACCESSORIAL CHARGE, WAS ENTITLED TO LOOK TO THE RESPECTIVE LINE-HAUL CONDITIONS

Appellant urges (Br. 35–48) that as a matter of law the Commission was required under Sections 2 and 3 (1), when considering a separately stated accessorial charge, to look only to the physical conditions surrounding such charge and was precluded from looking to the line-haul transportation conditions. Our position is that there is no rule of law so limiting the Commission, and that the question is a factual one entrusted to the Commission's informed discretion, to be decided under the circumstances of each case as part of the Commission's general function in determining the admittedly factual ultimate question as to whether a discrimination or prejudice is unjust or undue. See *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *United States* v. *Chicago Heights Trucking Association*, 310 U. S. 344, 352–353; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546. We do not contend that the Commission is entitled to consider differences in circumstances not germane to transportation or which arise before or after the total transportation services began. Cf. *Interstate Commerce Commission* v. *Del. L. & W. R. R.*, 220 U. S. 235.

There is nothing in the express language of either Section 2 or 3 (1) which limits the Commission as appellant would do. The prohibition of Section 2 of course runs against the collection of a different charge "for any service rendered, or to be rendered, in the transportation of * * * property." But this merely means that it applies to accessorial services included in the broad definition of transportation in Section 1 (3) (a), in addition to actual carriage. For application of the prohibition, the service must still be rendered "under substantially similar circumstances and conditions," and nothing in the statute limits this latter phrase to the circumstances surrounding the particular accessorial service under consideration.

The Commission's decisions under Sections 2 and 3 (1) certainly do not support the proposition that when considering a separately stated accessorial charge the Commission is barred from considering line-haul conditions. The Commission has previously been faced with the problem as to whether is was discriminatory or prejudicial for a carrier to absorb in its line-haul rates for one shipper but not for another, the separately stated switching charges (accessorial) of another carrier. In those cases, it has examined the line-haul conditions with respect to the different shipments and has found discrimination or prejudice to exist or not depending upon whether or not the line-haul conditions were the same. *E. g., Richmond Cham-*

ber of Commerce v. *Seaboard Air Line Railway*, 44 I. C. C. 455, 462–466; *Tide Water Oil Co.* v. *Director General*, 62 I. C. C. 226. The Commission's conclusions in the former case, so far as they were presented to this Court, were specifically sustained in *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57. These cases differ from the present one only in that the separate accessorial charge absorbed for one shipper in the line-haul rate was that of another carrier. No reason is apparent why that should make any difference.

There are, of course, instances, as appellant points out (Br. 38–39), where the Commission has not considered line-haul conditions in considering a separate accessorial charge. Not only are these cases distinguishable, but they serve to confirm the truth of our contention that whether line-haul conditions are to be considered is a factual question for the Commission's informed determination on the basis of all the circumstances.

Appellant also contends (Br. 42, 45, 47), in reliance upon *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, that in determining the reasonableness of a separately stated terminal charge under Section 1 (5) (a) the Commission is not permitted to consider the line-haul charges. It is urged that by analogy the same rule should be applied under Sections 2 and 3 (1). The *Stickney* case merely holds, however, that where the terminal charges of one carrier are reasonable in themselves, such charges are not to be condemned because the

prior line-haul charges of a connecting carrier made the total rate unreasonable. The essential governing principle of that case is that one carrier may not be made to suffer for the shortcomings of another. In numerous cases both the Commission and the courts have specifically recognized that the *Stickney* case does not apply where the same carrier, as here, assesses the terminal charge and the line-haul charge. In these same cases it is further recognized that it is perfectly proper in determining the reasonableness under Section 1 (5) (a) of a carrier's separately stated accessorial charge (icing charge in these cases) to consider the line-haul freight rate and to determine whether elements of cost not provided for in the separate rate are in fact included in the line-haul rate. *Atchison, Topeka, & Santa Fe Railway Company* v. *United States*, 232 U. S. 199, 219–221; *Alton & S. R. R.* v. *United States*, 49 F. (2d) 414, 417–428 (N. D. Cal., statutory three-judge court); *Pacific States Butter, Egg, Etc. Assoc.* v. *Southern Pacific Co.*, 151 I. C. C. 244, 263–264; *Perishable Freight Investigation*, 56 I. C. C. 449, 461–465. These cases also hold that the language of Section 6 (1), upon which appellant relies (Br. 40), requiring the separate statement of terminal charges, does not prevent this result.

Consequently, if the Court adopts appellant's view that the same rule should be applied under Sections 2 and 3 (1) as is applied under Section 1 (5) (a), which we think it should, it will have no other course but to reject the construction of Sec-

tions 2 and 3 (1) now advanced by appellant. The plain truth of the matter is that whether a Section 1 (5) (a), 2 or 3 (1) issue is involved, the shipper can have no legitimate complaint unless the total assessed against him for *all* transportation charges is unfair compared with what others are assessed. Here, no such complaint can be maintained.

Finally, in this connection appellant asserts, on the authority of *Central R. R. Co. of New Jersey* v. *United States*, 257 U. S. 247, that the Commission was powerless to consider the line-haul rates because the connecting carriers who were parties to the through routes to the Southeast were not made respondents before the Commission. In that case the Commission had found a violation of Section 3 (1) because one carrier did not furnish the privilege of creosoting in transit to a creosoting company on its line, whereas other carriers with which it had joint tariffs did furnish such transit privilege at entirely different points to companies located on their lines. This Court held, however, that the granting or withholding of the transit privilege was a local practice solely within the control of the carrier on whose line it could be granted, and not within the control of other carriers who had joint tariffs with that particular carrier. Because the Court concluded that the preference there was not by the same carriers, and that Sec-

tion 3 (1) condemned only the granting of a preference by the same carrier or carriers, it set aside the order.

It is difficult to see how that decision militates against the legality of the Commission's present action. Here the discrimination, if any, between shippers was caused by the same carriers, the railroad appellees, because of their local loading charge. The Commission did not purport to pass upon the validity of line-haul rates of connecting carriers not before it or to require any action from them with respect to this local loading charge over which they had no direct control. It merely looked to the respective line-haul conditions in determining whether the local loading charge of the carriers before it was discriminatory or prejudicial. The *New Jersey Central* case plainly does not prevent this, and the fact that the other connecting carriers were not before the Commission is of no significance.

If we are correct in our view that the question whether the line-haul conditions were to be considered is a factual one within the Commission's discretion (see pp. 28–30, *supra*), the circumstances here plainly afford a rational basis for the Commission's decision to consider them and preclude the disturbance of this conclusion of the Commission. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146. Thus, the incidence of the loading charge is made to depend by

these tariffs solely upon whether the cotton is transported to one line-haul destination or another; the loading costs, when no loading charge is assessed, are absorbed by the railroads out of their line-haul rates; and the loading charge is not even paid until the line-haul is completed and the ultimate destination known, and then only by deduction by the carrier from the refund of a portion of the line-haul rates made under the transit settlement.

III

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S FINDINGS.

In considering the evidence before the Commission, this Court under the well settled rule cannot weigh the evidence but can only ascertain whether there is any substantial evidence in the record to support the Commission's findings *New England Divisions Case*, 261 U. S. 184, 204; *Western Chemical Co. v. United States*, 271 U. S. 268, 271; *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 490. Appellant challenges the evidence only on two findings: as to difference in truck competition, and as to the relative level of the line-haul rates. Merely the evidence which appellant admits was in the record requires the rejection of these contentions.

In connection with the evidence on the question of truck competition, appellant admits (Br. 32) that the evidence shows that while there was truck

competition from the compress points to the Texas Gulf ports there was no such competition from the compress points to the Southeast. The objection is made, however, that the evidence shows the same amount of truck competition between gin origins and nearby compress points on all cotton shipments, regardless of whether they are ultimately reshipped to the Gulf ports or to the Southeast. This is quite true but of no importance. The Commission based its decision on the theory that it was entitled to look to line-haul conditions, and the finding made is plainly to the effect that there is line-haul truck competition to the Texas Gulf ports, but none to the Southeast (R. 22, 23). The evidence, by appellant's own admission, supports such a finding.

As to the question of evidence with respect to the Commission's finding that the carload levels were already relatively lower to the Southeast than to the Gulf ports (R. 23, 24), we refer the Court to Exhibit 38 (R. 272) before the Commission, appended to appellant's brief (p. 56). This exhibit shows line-haul carload rates [11] in cents per hundred pounds, average earnings per ton mile in mills, and average earnings per car-mile in cents. Using certain Oklahoma cities as representative origins [12] and

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[10] As proof of that fact, see R. 115–116, 119–120, 122, 137–139.

[11] The different rates listed therein are for varying minimum weights and are referred to by column number.

[12] These cities are Anadarko, Chickaska, Clinton, Elk City, Hobart, Oklahoma City, Pauls Valley and Waurika.

Houston, Texas, and Columbia, South Carolina, as representative destinations for the purpose of analysis, the following results appear:

From Oklahoma Origins

[Average distance to Houston, Tex., 453 miles; to Columbia, S. C., 1,193 miles]

Item	To	Min. lbs. 25,000	Min. lbs. 40,000	Min. lbs. 50,000	Min. lbs. 65,000
Rate	Houston	54		47	40
	Columbia	82	73	67	
Earnings per ton-mile	Houston	23.8		20.8	17.7
	Columbia	12.7	12.2	11.2	
Earnings per car-mile	Houston	29.8		30.8	37.4
	Columbia	17.2	21.4	29.1	

This diagram illustrates that the ton mile and car mile gross earnings to the Southeast under the carload rates are much lower than they are to the Texas Gulf ports. Appellant admits this (Br. 32–34) but points to the fact that the Commission has frequently held that rates for longer distances should properly yield lower returns than rates for shorter distances and that a bare comparison of rates to different territories which shows nothing but rates and distances is without probative value. Examination of the cases cited by appellant (Br. 34) reveals that they deal with an entirely different situation. In these cases it was claimed that a rate was unreasonable or discriminatory, and the only evidence to support this claim was that it brought the carrier a different gross car mile or ton mile return than some other rate. Naturally, if a carrier is entitled to higher ton and car mile earnings when a haul is short, the fact that it is receiving

such under a particular rate has little probative value in establishing the illegality of that rate. Here, however, the fact that the ton and car mile gross earnings are lower to the Southeast is not employed by the Commission in support of a proposition that there is anything unlawful about the level of the respective line-haul rates. Rather, it is used only to show that the rate level to the shipper was relatively lower on the traffic to the Southeast. Plainly, this evidence as to car and ton mile earnings has probative value for that purpose and constitutes substantial evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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FEBRUARY 1943.

APPENDIX

Interstate Commerce Act, February 4, 1887, c. 104, Part I, 24 Stat. 379, as amended.

Section 1 (1) (a) provides:

> The provisions of this chapter shall apply to common carriers engaged in—
>
> The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *
>
> * * * * * *
>
> From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States; or from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States (49 U. S. C. 1 (1) (a)).

Section 1 (3) (a) provides:

> The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in

this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation of delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof (49 U. S. C. 1 (3) (a)).

Section 1 (5)-(a) provides:

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful (49 U. S. C. 1 (5) (a)).

Section 2 provides:

> If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful (49 U. S. C. 2).

Section 3 (1) provides:

> It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of

any other carrier of whatever description (49 U. S. 3 C. (1)).

Section 6 (1) provides:

> Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively,

are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter (49 U. S. C. 6 (1)).

Section 15 (1) provides:

Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the

extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed (49 U. S. C. 15 (1)).

Section 15 (7) provides:

> Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or

practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible (49 U. S. C. 15 (7)).

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